IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BLACKLIGHT POWER, INC. Plaintiff, v. Q. TODD DICKINSON, Commissioner of Patents Defendant.	)	No. 00 0422 EGS

REPLY IN SUPPORT OF
PLAINTIFF'S MOTION TO AMEND THE SCHEDULING ORDER

I. The Court Should Reject the Patent Office's Attempt To Raise Issues Outside of the Administrative Record.

Plaintiff's present Motion to Amend the Scheduling Order seeks an extension to provide the Court sufficient time to reach a decision on the merits of the parties' pending cross-motions for summary judgment and an opportunity for either party to move for a stay pending any appeal that might be taken from that decision.[1] The posture of this case awaiting summary judgment did not just happen by accident. Rather, it resulted from the parties' negotiated settlement in which BlackLight agreed to withdraw its previously-filed application for a temporary restraining order and preliminary injunction in exchange

[1] Plaintiff proposed that the stay extend ten days after any judgment to allow the losing party (whether it be Plaintiff or the Patent Office) to seek a stay pending appeal. The extra ten days was for both parties' convenience because Plaintiff believed that pending any appeal, the Patent Office would not want to be directed to issue a patent, just as Plaintiff would not want an adverse office action to issue. Thus, contrary to the Patent Office's argument (Def. Opp. 4), the extra ten days suggests nothing about Plaintiff's belief in the strength of its case.

As previously noted in Plaintiff's patent counsel's Declaration executed on April 4, 2000, Group Director Kepplinger told him that Director Dickinson directed her to review the '294 application after he received communications from undisclosed third-party sources. Exhibit 1 to Plaintiff's Motion for Summary Judgment. Although Group Director Kepplinger did not at that time disclose the third-party source, Plaintiff has done some discovery of its own and now knows why it is no coincidence that the Patent Office relied so heavily on the statements of Dr. Park, a physicist with the American Physical Society (APS), in its March 22 Decision, as this was not the first time the two have had close ties. As the Court may recall, another physicist, Dr. Peter Zimmerman, Chief Scientist for the U.S. Department of State, published an Abstract for an upcoming speech to be delivered to the APS boasting that the State Department and the Patent Office "have fought back with success" against BlackLight. Plaintiff's Reply in Support of its Motion for Summary Judgment, at 2 n.1. In an interview with Dr. Zimmerman to find out the source of those comments, he claimed to be only a "receiver" of information, not a "donor" and that it was Dr. Park who has had contact with someone in the Patent Office that Park specifically refers to as "Deep Throat." July 10, 2000, Letter to Thomas Heinemann, Esq., from Jeffrey A. Simenauer, Esq. (Exhibit 1 hereto).

While the dispute about what led to Group Director Kepplinger's review should have no bearing on the Court's decision on the pending motions for summary judgment, it does help explain why the Patent Office is now anxiously searching for some other excuse to justify its procedural missteps.

Session J12 - FPS Awards Session-Business Meeting.
MIXED session, Sunday afternoon, April 30
101B, Long Beach Convention Center

[J12.001] Touching the Third Rail: Encounters with Pseudoscience and Pseudoscientists

Peter D. Zimmerman (United States Department of State, Washington, DC 20520)

Pseudoscience, and particularly "pseudophysics" is alive and thriving as we approach the turn of the millennium. Not only have many "inventors" of cold fusion spin-offs been making money from investors, but they and "inventors" of various kinds of "zero point energy" devices, perpetual motion machines, and other wonders such as "hydrinos" have found friends in the United States Senate. At least one Nobel Laureate in physics has come to their aid. The Web has been a powerful organizing force as well.

Some organizations, including my own Department and the Patent Office have fought back with success, but always at great cost in time and energy. Pseudophysicists and their friends have money, influence, and sometimes clout. They have not hesitated to use threats, personal attacks, and the full machinery by which government is made accountable to the public to strike at those who expose technical fraud. Encounters with pseudophysicists are like grabbing a hot wire: after the first contact it is hard to get free, and it can inflict serious injury. But you, and I, and all our colleagues in the APS must do what we can to ensure that U.S. policy is not manipulated by pseudoscience, to make certain that taxpayer money is not wasted on nonesense, and to restore public confidence in real science. This will take efforts at public education, work, and as I have learned in the last year not a little bit of courage. APS and FPS should be in the thick of the battle. This talk is an account of a year in the fray.

Part J of program listing

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July 10, 2000

VIA FACSIMILE &
U.S. MAIL

Thomas Heinemann, Esq.
Attorney Advisor
United States Department of State
Office of the Legal Advisor
2201 C Street, N.W.
Washington, DC 20520

Re: BlackLight Power, Inc.

Dear Mr. Heinemann:

This letter documents separate telephone conversations we had with you and Dr. Zimmerman last Friday, July 7, 2000.

We first telephoned you after having received the June 26, 2000 letter that you transmitted from James Thessin, Deputy Legal Advisor for the Department of State. In his letter, Mr. Thessin advises that the State Department sees no basis for liability on its part in the matter involving Dr. Peter Zimmerman referred to in our prior correspondence, dated May 12, 2000. Mr. Thessin further represents that Dr. Zimmerman did not give the speech at the APS conference and, based on what Dr. Zimmerman told him, did not contact the Patent Office regarding the intellectual property rights of BlackLight Power.

Even if it were true that Dr. Zimmerman did not himself contact the Patent Office, we have good reason to believe that he knows who did. That, together with Dr. Zimmerman's Abstract of his speech at the APS conference, which boasts that the State

Department and the Patent Office "have fought back with success" against BlackLight, certainly suggests that the State Department has played a role in this matter. The purpose of our May 12 letter was to explore the precise nature of that role and, to that end, we requested that you provide us with certain information that might lead to an amicable resolution of this matter.

Given the serious implications of Dr. Zimmerman's Abstract, and our good-faith offer to resolve this matter, we certainly expected more than the "brush off" we received from Mr. Thessin. His condescending declaration that the State Department "considers the matter to be closed," while making your position perfectly clear, simply ignores the reality and gravity of the situation and will not make it go away.

In view of that position, we specifically inquired during Friday's phone conversation with you whether anyone at the State Department was serving as counsel for Dr. Zimmerman in this matter and, if not, whether you had any objections to our contacting Dr. Zimmerman directly to confirm the statements by Mr.Thessin in his letter. You said that you had no objection to our speaking with Dr. Zimmerman since, in your words, there was no actionable matter and, therefore, no need for the State Department to provide him with counsel. When I asked you for Dr. Zimmerman's inter-office phone number where he could be reached, you said you did not have his number readily available and suggested that I retrieve it through the State Department's general information number.

Based on your response to my request to speak with Dr. Zimmerman, we immediately telephoned him to see if he would be willing to speak with us in his individual capacity in an attempt to resolve this matter amicably with him. At the very outset of our conversation, we informed Dr. Zimmerman that we had just spoken to you and that you had no objections to our calling him. We even suggested that he could check with you first before discussing the matter with us and also that he was free to consult with his own chosen representative before doing so. Dr. Zimmerman confirmed your earlier statement that he was not being represented by counsel for the State Department, or any other counsel, and we then proceeded with our conversation.

Dr. Zimmerman seemed anxious to put this matter behind him. He claimed that he was only a "receiver" of information, not a "donor," and repeated what Mr. Thessin states in his letter, namely that he did not contact anyone in the Patent Office regarding the intellectual property rights of BlackLight Power. Dr. Zimmerman also admitted that some of the information he received included e-mails from Dr. Park of the APS and that Dr. Park had told him of a contact in the Patent Office Dr. Park refers to as "Deepthroat." Unfortunately, our discussion was abruptly cut short when Dr. Zimmerman informed us that he had just received an e-mail from you advising him not to speak with us and that we would therefore have to end our conversation.

Your advice that Dr. Zimmerman cease all communications with us came somewhat as a surprise given your earlier consent to our speaking with him. In addition, your prior representations referenced in our May 12 letter that Dr. Zimmerman was acting in his individual capacity and not on behalf of the State Department regarding matters reflected in the APS Abstract would appear to be in direct conflict with your advising him on whether to communicate with us.

Be that as it may, we will certainly abide by your wishes and will have no further communications with Dr. Zimmerman on this matter until we hear from either you or him that we are again free to do so. Assuming, however, for the sake of argument only that Dr. Zimmerman was being truthful regarding his passive role in this matter, we find it incredible that you would not want to convey that information so as to put this matter behind us. Your muzzling of Dr. Zimmerman only creates a heightened suspicion that, perhaps, the State Department does indeed have something to hide and that there is a basis for liability as the APS Abstract and other evidence in our possession suggests.

Should the State Department decide to change its position and reopen this matter to consider our request for information known to be in its possession, we stand ready to take this matter up with you again. Should you decide instead to maintain your present position, giving us no choice but to secure this information through formal discovery in a legal proceeding, we are prepared to take that alternative course of action as well.

In either case, we assume you will take all necessary steps to preserve the information we are seeking, including but not limited to any e-mails or other communications Dr. Zimmerman or other State Department officials have had with Dr. Park or others regarding BlackLight's intellectual property rights. We are also particularly interested in preserving all information that may be in your possession or under your control relating to Dr. Park's "Deepthroat" contact in the Patent Office.

In the meantime, we have requested that Dr. Zimmerman, after further consultation with you and/or a chosen legal representative, advise us whether or not we can expect to continue our conversation to see if we can reach an amicable resolution of this matter, at least with respect to him in his individual capacity.

Given your instruction to Dr. Zimmerman to cease all communications with us, we kindly request that your provide a copy of this letter to him, as well Mr. Thessin. Thank you.

Sincerely,

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cc: Dr. Peter Zimmerman (via Thomas Heinemann)
Mr. James Thessin, Esq. (via Thomas Heinemann)
Ms. Jamison Borek, Esq.
Dr. Shelby Brewer

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What's New

by Bob Park

The American Physical Society

Friday, 18 August 2000 Washington, DC

1. NULL HYPOTHESIS: DO ASTRONAUTS SUFFER MAGNETIC DEFICIENCY?

I must tell you, I bought a pair of Florsheim MagneForce shoes this week (WN 11 Aug 00). I have not been sick since. More on my new shoes in a later issue. Today, I want to share another Gary Null quote from the free brochure Florsheim gave me (at $125 the shoes were not free): "90-95% of health problems astronauts experienced after early space flights were eliminated when magnets were put in space suits and space capsules to counter the effects of traveling outside the earth's magnetic field." That's remarkable, since early flights never got beyond low-Earth orbit where the field is essentially unchanged. Nevertheless, we felt obliged to ask NASA. Answer: There has never been a magnet in a space suit.

2. BLACKLIGHT: SUIT AGAINST THE PATENT OFFICE FAILS.

BlackLight Power's plans to go public with an estimated $1B stock offering are presumably on hold. You may recall that on 15 Feb BLP was awarded a patent on a process for putting hydrogen atoms into a "state below the ground state," shrinking them into teeny little things called "hydrinos" (WN 18 Feb 00). A second patent dealing with hydrino chemistry was set for issuance two weeks later. But on 17 Feb the Patent Office withdrew the second patent, and opened up the first for reexamination. One patent official was concerned that the BLP technology involves perpetual motion and "cold fusion."
With its intellectual property somewhere in patent purgatory, BlackLight filed suit in Federal Court against the Commissioner of Patents. Tuesday, Judge Emmet Sullivan ruled the Patent Office action was "neither arbitrary nor capricious."